

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suede G. Kelly.

Duke Energy South Bay, LLC

Docket No. ER05-128-000

ORDER ACCEPTING AND SUSPENDING PROPOSED REVISIONS TO  
RELIABILITY MUST-RUN AGREEMENT AND ESTABLISHING HEARING AND  
SETTLEMENT JUDGE PROCEDURES

(Issued January 12, 2005)

1. In this order, the Commission accepts for filing and suspends for a nominal period proposed revisions by Duke Energy South Bay, LLC (DESB) to its Reliability Must-Run Agreement (RMR Agreement) with the California Independent System Operator Corporation (CAISO), and establishes hearing and settlement judge procedures.<sup>1</sup> This order benefits customers because it allows DESB to continue providing must-run generation to the CAISO, while providing an opportunity to resolve outstanding issues through settlement negotiations or hearing.

**I. Background**

2. RMR Agreements provide the rates, terms, and conditions by which DESB and other power plant owners in California provide RMR service to the CAISO by dispatching designated units at certain power plants at the direction of the CAISO. The RMR Agreements require that, whenever the CAISO extends the terms of an RMR Agreement for an additional calendar year, the owner of the unit must file with the

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<sup>1</sup> DESB's RMR Agreement conforms to a standard form that was agreed to as part of an uncontested settlement. *See California Independent System Operator Corporation*, 87 FERC ¶ 61,250 (1999) (order approving settlement).

Commission (in an informational filing and a rate filing) updates to certain rates and terms of service under the RMR Agreement.<sup>2</sup>

3. The CAISO designated DESB's facilities for RMR service for calendar year 2005 (Year 2005). As a result of that designation, on October 29, 2004, DESB submitted its Informational Package and its section 205 Filing. Pursuant to Schedule F of the RMR Agreement, DESB's Informational Package provides for the AFRR values and the VOM rates for its units under the RMR Agreement. DESB's Section 205 filing reflects the various annual updates to the rates of its units subject to the RMR Agreement. Specifically, DESB's section 205 filing proposes a number of revisions to the schedules in the RMR Agreements for DESB for the Year 2005, including: (1) Schedule A of the RMR Agreement to reflect the contract service limits and owner's repair cost obligation; (2) Schedule B to revise the values in Tables B-1 through B-6, which are used to determine the Monthly Option Payment for the RMR units; and (3) Schedule D to update the Pre-paid Start-up Costs and Pre-paid Start-up Charges.

4. DESB states that it submits both its section 205 Filing and its Schedule F Filing together for administrative efficiency, given that several of the revisions in the Section 205 Filing incorporate the AFRR values derived in the Schedule F Filing. DESB requests that all of the rate revisions become effective January 1, 2005.

## **II. Notice of Filing and Responsive Pleadings**

5. Notice of DESB's filing was published in the *Federal Register*, 69 Fed. Reg. 65,423 (2004), with interventions and protests due on or before November 19, 2004. This date was subsequently extended to December 13, 2004. The Public Utilities Commission of the State of California, the California Electricity Oversight Board, and San Diego Gas and Electric Company (SDG&E) filed interventions. SDG&E and the CAISO (collectively, the Protestors) filed a joint protest.

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<sup>2</sup> The annual updates are usually made in two separate filings. The first is an informational filing that contains Annual Fixed Revenue Requirements (AFRR) values and Variable Operation and Maintenance Rates (VOM) rates (Information Package). The second is a rate filing made pursuant to section 205 of the Federal Power Act, 18 U.S.C. § 824d (2000), reflecting the annual updates provided for in the RMR Agreement (Section 205 Filing).

### **III. The Joint Protest**

6. The Protestors claim that DESB's filing is an unwarranted unilateral change to the currently applicable allocation methodology for distributing the total AFRR between South Bay units. Protestors further claim that allocating total plant AFRR by expected unit service hours per year, as DESB proposed to do, rather than by unit size in megawatts is inappropriate because the change is inconsistent with cost causation principles. The Protestors allege that the filing is also deficient in its supporting information for a rate schedule change. The Protestors urge the Commission to reject DESB's submittals, or in the alternative, that they be suspended and made effective subject to refund, and that the matter be set for hearing.

### **IV. Discussion**

#### **A. Procedural Matters**

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the notices of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

#### **B. The Commission's Response**

8. The Protestors' concerns, which are identified above, raise factual questions concerning DESB's filing that we cannot summarily decide on the record before us. These concerns are best addressed in the hearing and settlement judge procedures that we order herein. In addition, based on our review of DESB's filing, we find that its proposed revisions to its RMR Agreement have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept the proposed revisions to DESB's RMR Agreement for filing, suspend them for a nominal period, to become effective, subject to refund, on the date requested by DESB, and set them for hearing.

9. While we are setting this proceeding for a trial-type, evidentiary hearing, we will hold the hearing in abeyance and direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, in order to assist the parties in resolving this matter.<sup>3</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief

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<sup>3</sup> 18 C.F.R. § 385.603 (2004).

Administrative Law Judge will select a judge for this purpose.<sup>4</sup> The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) DESB's filing is hereby accepted for filing and suspended for a nominal period, to become effective January 1, 2005, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the proposed revisions to the RMR Agreements. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge within 15 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a separate judge, they must make their request to the Chief Judge within 5 days of the date of this order.

(D) Within 60 days of the date of this order, the settlement judge shall file a report with the Chief Judge and the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions if appropriate, or assign the case to a presiding

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<sup>4</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience, available at: <http://www.ferc.gov/about/offices/oalj/oalj-dj.asp>.

judge for a formal hearing, if appropriate. If the parties are given additional time to continue their efforts, the settlement judge shall file a report at least every 30 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward resolving the outstanding issues.

(E) If settlement discussions fail, and a formal hearing is to be held, a presiding judge to be designated by the Chief Judge shall convene a conference in this proceeding to be held within approximately 15 days of the date the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.